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STANDING RESOURCES DEVELOPMENT COMMITTEE

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REPORT ON THE ANNUAL REPORT OF THE ONTARIO HIGHWAY TRANSPORT BOARD FOR 1977

3rd Session 31st Parliament
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LETTER OF TRANSMITTAL

Ontario

The Honourable John E. Stokes, M.P.P.,
Speaker of the Legislative Assembly.

Miscellaneous publication
3

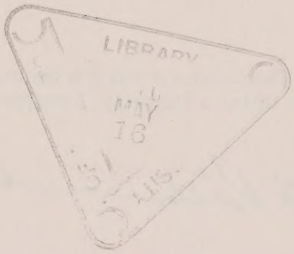
Sir,

Your Standing Committee on Resources Development has the honour to present its Report on the Annual Report of the Ontario Highway Transport Board for 1977 and commends it to the House.

Osie F. Villeneuve

Osie F. Villeneuve, M.P.P.
Chairman

Queen's Park
18 December 1979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STANDING RESOURCES DEVELOPMENT COMMITTEE

Membership as of Thursday, 11 October 1979*

MARION BRYDEN
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EVELYN GIGANTES
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RONALD K. McNEIL
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WILLIAM G. NEWMAN
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JAMES A. TAYLOR, Q.C.
RONALD G. VAN HORNE
OSIE F. VILLENEUVE
BUD WILDMAN
PAUL J. YAKABUSKI

SUB-COMMITTEE ON THE ONTARIO HIGHWAY TRANSPORT BOARD

ERIC CUNNINGHAM
JOHN LANE
ED PHILIP

A. SMIRLE FORSYTH
Clerk pro tem of the Committee

* Membership of the Committee during its hearings on the Annual Report of the Ontario Highway Transport Board for 1977 is listed on the following pages.

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Membership during Hearings in February, 1979

Ted Bounsall for Odoardo Di Santo
James R. Breithaupt, Q.C., for Julian Reed
Margaret Campbell, Q.C., for Michael Bolan, Q.C.
Sean Conway for Michael Bolan, Q.C.
Eric Cunningham for Hugh P. O'Neil
Ed Havrot (Chairman, 2nd Session)
Jack Johnson
Bob Mackenzie
Ed Philip for Marion Bryden
Jack Riddell
David Rotenberg for Alan Pope
James A. Taylor, Q.C.
John Turner
Andy Watson
Paul J. Yakabuski
Fred Young for Bud Wildman

Membership on Thursday, 26 April 1979

Eric Cunningham for Julian Reed
Odoardo Di Santo
Ed Havrot
Jack Johnson
John Lane
Ronald K. McNeil
Ed Philip for Marion Bryden
Jack Riddell
Osie F. Villeneuve (Chairman)
Andy Watson
Ed Ziemba for Bud Wildman

Membership on Tuesday, 1 May 1979

Ted Bounsall for Odoardo Di Santo
Robert J. Eaton
Jim Foulds
Jack Johnson
John Lane
Ronald K. McNeil
Ed Philip for Marion Bryden
Jack Riddell
Osie F. Villeneuve (Chairman)
Andy Watson
Bud Wildman
Paul J. Yakabuski

Membership on Thursday, 6 September 1979

Eric Cunningham for Julian Reed
Odoardo Di Santo
Murray Gaunt for Ronald Van Horne
Mickey Hennessy for Jack Johnson
John Lane
Tony Lupusella for Jim Foulds
Mac Makarchuk for Bud Wildman
Ronald K. McNeil
Gordon I. Miller
Ed Philip for Marion Bryden
Jack Riddell
James A. Taylor, Q.C.
Osie F. Villeneuve (Chairman)

INTRODUCTION

On Tuesday, 31 October 1979, the Annual Report of the Ontario Highway Transport Board for 1977 was referred to the Standing Resources Development Committee upon the petition of twenty members of the Legislative Assembly pursuant to Provisional Order No. 7 (now Standing Order 33(b)). On Friday, 15 December 1978, the Committee was authorized to consider the Report during the Recess of the House, and on Thursday, 8 March 1979, the Report was again referred to the Committee for consideration during the 3rd Session of this Parliament.

Your Committee met for purposes of organization on Monday, 19 February 1979, and on Tuesday, 26 April 1979, and adopted the following procedures for the conduct of the hearings:-

(1) All witnesses gave evidence under oath or by affirmation (the exceptions were Blenus Wright, Q.C., John D. Hylton, Esq., and the Honourable James W. Snow, M.P.P.).

(2) Each witness invited was afforded the right to appear with his own counsel to advise and assist him.

(3) Counsel for the witnesses were permitted to make objections to questions put to their clients and, in appropriate cases, to give reasons for such objections.

(4) The right of such counsel to question his own client or any other witness was restricted so that all such questioning was required to be done firstly by members of the Committee and secondly by members of the Legislative Assembly who were not members of the Committee.

(5) Witnesses were subject to recall by the Committee and were not excluded from the hearings while not giving their testimony.

(6) Witnesses were permitted to invoke the protection of The Ontario Evidence Act and Canada Evidence Act.

Your Committee met for eleven sittings during the period commencing Monday, 19 February 1979 and ending Thursday, 6 September 1979, and heard evidence from fourteen witnesses, some of whom testified on more than one occasion (see Apppendix 1 for a list of the witnesses).

INDEPENDENCE AND IMPARTIALITY OF THE BOARD

Your Committee believes that it is crucial that the impartiality and the independence of the Board be above reproach. If the Board is brought into disrepute, the viability of the regulatory system is undermined. The real issue which confronted this Committee throughout was the future reliability, integrity and sensitivity of the Ontario Highway Transport Board and, therefore, the regulated industry.

During the course of the hearings, the Committee heard serious allegations of bribery involving the former Chairman, Mr. Shoniker. Your Committee places no weight on this evidence which was in its entirety hearsay and unsubstantiated.

Allegations were also heard respecting persons having or pretending to have influence with the Board. Your Committee heard testimony which indicated that the Ontario Provincial Police had seized documents in the course of a criminal investigation into the allegations.

Your Committee believes that the investigation of such allegations is more properly left to the Ontario Provincial Police. We recommend, however, that the Solicitor General make an interim report to the House without delay on the investigation and that a report be made to the House when the investigation has concluded.

Testimony was also heard respecting the receipt of gifts by members of the Board. The former Chairman of the Board, Mr. Shoniker, indicated that "bottles of whiskey, the odd box of cigars, the odd turkey" had

been received but that "honesty and integrity was required of each Board member". Another former member of the Board, Mr. Diplock, testified that he was tendered gifts such as turkeys and flowers at Christmas, 1976, but that he had returned them or donated them to charitable bodies. Mr. Diplock indicated that he discussed the receipt of gifts with some of the other members of the Board and concluded that it did not appear to be an uncommon practice.

Mr. Shoniker and Mr. Diplock were both unaware of memoranda from the Ministry of the Attorney General and the Civil Service Commission dated 22 November 1973 and 21 November 1975, respectively, dealing with the acceptance of gifts and benefits. These memoranda advised that:

> "Section 110 (of the Criminal Code of Canada) makes it a criminal offence, in certain circumstances, for a public servant to demand, accept or offer, or agree to accept, directly or indirectly, a reward, advantage or benefit of any kind in connection with Government business, or from a person having dealings with the Government.
>
> "You will note that section 110(1)(a) and (d) make it an offence for a public servant to demand, accept or offer, or agree to accept, directly or indirectly, for himself or another person, any such benefit in return for co-operation, assistance, exercise of influence or an act or omission in connection with certain specified matters.
>
> "Furthermore, section 110(1)(c) makes it an offence for a public servant, by himself or through a member of his family or through anyone for his benefit, to demand, accept or offer, or agree to accept directly or indirectly, a commission, reward, advantage or benefit of any kind from a person who has dealings with the Government, unless he has the consent in writing of the head of the branch of Government that employs him. It should be emphasized that it is the acceptance of the benefit from a person having dealings with the Government which constitutes the criminal offence, regardless of whether anything is done by the public servant in return for such benefit.

"There are clearly many situations in which gifts are offered to public servants in circumstances in which the provisions of section 110 are applicable. Public servants must be made aware of these provisions and recognize that it is their duty to refuse to accept, or if delivered, to return any gift or other benefit which is proffered under these circumstances.

"While it is difficult to specify all situations in which section 110 might be applicable, the practice which has grown up in the past of the giving of Christmas gifts to public servants by persons having dealings with the Ministry in which they are employed, would, in my opinion, fall within section 110(1)(c) unless the appropriate consent in writing to the receipt of the gift has been given."

The tendering to and in some instances acceptance of gifts by members of the Board disturbed the Committee. Although the evidence before the Committee did not indicate that members of the Board were influenced by these gifts, your Committee is concerned that a cloud of suspicion could be created that influence could be had in the decision-making process and that a fair hearing might not be forthcoming.

Your Committee therefore recomends that the members and staff of all agencies, boards and commissions be made aware of the provisions of section 110 of The Criminal Code of Canada and the prohibition against receipt of gifts and benefits.

Section 18b of The Ontario Highway Transport Board Act states in part:

18b.-(1) Members of the Board assigned to render a decision or report after a hearing shall not have taken part prior to the hearing in any investigation or consideration of the subject-matter of the hearing and shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any person or any party or his representative except upon notice to and opportunity for all parties to participate, but such members may without such notice,

(a) consult with other members of the Board; and

(b) seek legal advice from a legal adviser independent of the parties but in such case the nature of the advice shall be made known to the parties in order that they make submissions as to the law.

Evidence before the Committee suggested that the former Chairman of the Board, Mr. Shoniker, had acted in a manner which was at variance with the provisions of the Act outlined above.

Mr. Shoniker testified that he had asked legal counsel appearing before the Board for help in legal matters touching applications being heard by the Board. The Committee was also confronted with testimony by the President of United Parcel Service Canada Ltd., Glen Smith, alleging that the former Chairman of the Board had advised him to produce more witnesses at the hearing of their operating authority application. Mr. Smith testified that after this unsolicited advice, the strategy of the presentation was changed and extra witnesses were brought forward on the expectation that the volume of additional evidence was required for favourable consideration of the application. Mr. Shoniker denied that such advice had been tendered to Mr. Smith.

It is irregular, and in the opinion of your Committee, a violation of The Ontario Highway Transport Board Act, for the Chairman or any member of the Board to contact any of the parties to an application before the Board with regard to the presentation of evidence, the conduct of a case, legal advice or other such matters. The preservation of an independent and impartial Board requires that the members of the Board remain independent from the parties appearing before them in all respects and in all activities.

Your Committee dealt at considerable length with the facts surrounding preparation of the reasons for decision in an application by United Parcel Service Canada Ltd. for an operating authority. The evidence confirmed that Mr. Shoniker had asked Richard Zimmerman, counsel to certain of the

opponents to the application, to prepare draft reasons for decision.

The former Chairman testified that prior to 1969 he sometimes asked counsel apearing before him to prepare draft reasons for decision based on his instructions or on the argument of such counsel. Mr. Zimmerman gave evidence that Mr. Shoniker had told him that he had asked other counsel to write draft reasons for decisions in other contested cases; however, this was the first time that Mr. Zimmerman had been asked to draft reasons for decision in a contested aplication.

Mr. Shoniker did not perceive a violation of s.18b of The Ontario Highway Transport Board Act in his request to Mr. Zimmerman to prepare the draft reasons for decision. He believed that the Act prevented him from reaching the decision with anyone but the other Board member sitting on the application, and that once he had reached his decision free from interference, he was not acting improperly in asking for assistance in writing his report. Likewise, Mr. Zimmerman did not feel that s.18b of the Act extended beyond the point at which the Board had reached its decision. Mr. Zimmerman did not indicate to Mr. Shoniker that such a request was improper, nor does it appear that Mr. Shoniker sought counsel as to the propriety of his proposed actions.

Your Committee has no objection to the practice of the Board adopting the argument of a party or parties and incorporating this in the reasons for decision. However, your Committee is of the opinion that the practice of seeking the help of counsel participating in a hearing in the drafting of reasons for decision of the Board may amount to a denial of natural justice because it raises, not unreasonably, a suspicion of bias in others. It is an injustice for the Board, which is entrusted with the duty to determine the rights of the industry and the public, to privately involve any interested or outside party in the Board's decision-making function. We have no difficulty in accepting the testimony of Mr. Zimmerman that he had prepared the draft reasons for decision based on a determination of the case which Mr. Shoniker had already reached. However, justice cannot appear to have been done when the conduct of the members of the Board brings into question the ability of the Board to act judiciously and impartially.

Of Mr. Shoniker's conduct, your Committee is of the opinion that it indicated an unfamiliarity with the Act which established the Board and governs, in part, its operation. Mr. Shoniker's conduct amounted to either a disregard for the provisions of The Ontario Highway Transport Board Act or unwarranted ingnorance of the Act.

Your Committee is just as concerned with the involvement of counsel in this case. The role of the lawyer involves a sense of responsibility to the community and to the institutions which serve it. Anyone practicing before the Board has a responsibility to familiarize himself with all of the statutes, rules and regulations which would effect his relationship with the Board. As a basic principle, all lawyers are under an obligation to uphold the law and not to knowingly breach a statute while acting in a professional capacity. As well, we are of the opinion that it is improper for counsel to communicate privately with a member of the Board about a pending case in the absence of their adversaries or without notice to them.

Your Committee therefore recommends that The Law Society of Upper Canada review the complete transcripts of the hearings to determine whether disciplinary proceedings should be taken against any member of the Society for a breach of the Rules of Professional Conduct.

Your Committee further recommends that the Law Society of Upper Canada, the Minister of Transportation and Communications and the Ontario Highway Transport Board review the Code of Ethics for practitioners before the Interstate Commerce Commission (see Appendix 111) with a view to establishing a similar code of conduct for members of the Ontario Bar practicing before the Board and that the Minister report to the House the results of such review.

The conduct of members of the Board in the consideration of the application of Glengarry Transport Limited was also of considerable concern to the Committee. The application was heard before Vernon Page and John Wardrop commencing 7 April 1975 and concluding 4 July 1975. Mr. Page wrote reasons for decision denying the application. These reasons were agreed to by Mr. Wardrop and submitted to the then Chairman, Mr. Shoniker, at the end of September, 1975.

Mr. Shoniker subsequently spoke to both Mr. Page and Mr. Wardrop and returned the file to Mr. Page with the request or instruction that he review the reasons for decision. Mr. Shoniker never offered any reason for requesting or instructing this review, and Messieurs Page and Wardrop never questioned Mr. Shoniker as to the reasons or grounds for the review, even though Mr. Page in his testimony stated that this was the first time that Mr. Shoniker had asked him to review a decision. Neither Mr. Page nor Mr. Wardrop objected to the request or instruction to review the decision; nor did they infer from the request or instruction that the original reasons for decision were being questioned or did not meet with Mr. Shoniker's approval.

Mr. Page testified that the application was a borderline case and the review of the reasons for decision was based on his copious notes on the evidence. The final reasons for decision were handed to Mr. Shoniker at the end of December, 1975. This decision was ultimately issued on 22 June 1976, and reversed the earlier draft reasons for decision by approving the application.

There are many seriously questionable and unsatisfactory matters concerning the decision-making process in this case. In all instances, as we have noted above, justice should not only be done, but should manifestly and undoubtedly be seen to be done, and conduct such as in this case gives rise to suspicions that members of the Board may be influenced in reaching their decisions by matters extraneous to the evidence respecting public convenience and necessity. Your Committee views the conduct of the members of the Board in this case as improper and recommends that no member of the Board involve himself in the decision-making process unless he was present throughout as a member of the panel hearing a case.

GENERAL COUNSEL TO THE BOARD

During the course of the hearings, considerable comment was directed towards the need for counsel to assist members of the Board during the course of their hearings. Prior to 1978, there were Board members and staff members who were lawyers, but the evidence indicated that they did

not act in a role comparable to board counsel. Your Committee has been advised that at the present time, four members of the Board (including Mr. Stoddart who is on leave) are lawyers and two staff members are lawyers. The Board is also able to draw upon the resources of the Ministry of the Attorney General and outside counsel to provide assistance.

Although the legal expertise amongst the members and staff of the Board has dramatically increased in the last two years, your Committee recommends that a position of General Counsel should be established within the Board. The General Counsel would advise the Board regarding procedural matters and assist the Board and the Board Secretary in preparing notices; review applications in order to identify issues which result from the applicants' service proposals; prepare interrogatories in conjunction with Board staff requiring applicants to submit new evidence or expand on that already submitted; attend hearings as Board Counsel and conduct such examination of witnesses as is necessary to ensure that the record is complete and accurate; prepare and deliver argument at the end of a hearing; and advise the Board if required during their deliberations and when they are writing the reasons for decision. The General Counsel should be supported by such staff as he may require to assist him.

ADMINISTRATIVE STRUCTURE OF THE BOARD

On 26 September 1978, the Minister of Transportation and Communications announced that the Chairman of the Ontario Highway Transport Board would conduct a review of the Board aimed at up-dating and simplifying the Board's legal and administrative procedures to ensure a more responsive and coherent organization structure for the Board and to ensure the effectiveness of the Board in performing its statutory responsibilities.

A re-organization of the administrative and reporting structure of the Board was approved on 1 March 1979 and is being implemented through appointment of staff after competition. The Committee is informed that the review of the legal and administrative procedures of the Board is still being conducted.

Your Committee has noted with approval that the Board has created the position of Managing Director who will assume the responsibilities for the day-to-day administration of the Board from the Chairman and Vice-Chairman of the Board. The Committee recommends that increased emphasis be placed on the outreach or information role of the Secretary of the Board within the new-established Office of Proceedings. The Secretary's office should be the collecting and distributing facility on information on the Board. The outreach function would entail notifying, locating and assisting consumers, small business people and other parties not familiar with the Board's procedures, to enable them to make their views known in appropriate proceedings before the Board.

COMPLAINTS REGISTER AND REVIEW PROCEEDINGS

Your Committee further recommends that a register of complaints be established and maintained in a centralized complaint-handling centre and be open for inspection by the public. Coupled with the establishment of such a register must be the development of standardized procedures to verify the complaints. The principal thrust of the investigatory process must be to obtain voluntary resolution of complaints through direct contact with the licensee involved and to identify violative patterns which may require broad new regulatory or legislative initiatives.

The Committee recognizes that the initiation of any review proceedings based on a complaint that a licensee has violated the Act or the terms and conditions of his licence lies with the Minister of Transportation and Communications. However, your Committee recommends that once an established number of verified complaints have been lodged and recorded in the register against a particular licensee, the relevant information should be forwarded to the Minister of Transportation and Communications with a recommendation indicating the necessity of a review of the operating authority.

POLICY DEVELOPMENT

Your Committee emphasizes the need for the development of policy relating to matters to be considered by the Board when determining questions of public necessity and convenience and the dissemination of such

policy to the public. The Committee agrees with the Ontario Trucking Associaton that the rules of procedure codified in The Statutory Powers Procedure Act, 1971, cannot guarantee anything more than a fair hearing; they cannot guarantee that the Board will develop and clarify regulatory policies. The Committee recognizes that The Public Commercial Vehicles Amendment Act, 1979, goes a long way in meeting our concern in providing for the issuance of policy statements by the Lieutenant Governor in Council and the investigation of transportation policy matters by the Board at the direction of the Minister of Transportation and Communications.

PUBLICATION OF DECISIONS

The major factor guaranteeing impartiality and quality in decision-making is the publication of reasons for decision in each case which make clear and apparent the rationale for arriving at a particular decision. Your Committee therefore recommends that the Board should in all cases issue reasons for decision which include a thorough review of the evidence and a complete examination of the rationale for the decision.

DISPOSITION OF CASE BOOKS

During the course of Mr. Shoniker's testimony, the Committee was informed that it was the practice that members of the Board disposed of their case books and other materials when they left the Board. Your Committee recommends that the case books of members of the Board be retained by the Board when a member retires or otherwise leaves the Board. The Committee agrees with the Chairman of the Board, Mr. Alexander, that the notes taken by members of the Board are the property of the Ontario Highway Transport Board and not the individual Board members.

LICENCES

Testimony to the Committee indicated that the licencing process of the Board is far too complicated, lengthy and costly. Your Committee recommends that the present system of licencing be examined to determine if the process can be simplified and streamlined.

The Committee has been pleased to note that progress had been made in implementing some of the recommendations of the Select Committee on Highway Transportation of Goods. We do, however, recommend that the Minister of Transportation and Communications review the chapter in the Report of the Select Committee relating to the sale of operating licences with a view to seeing that the recommendations of the Committee are implemented as soon as possible.

APPPOINTMENT TO THE BOARD

The Ontario Highway Transport Board is presently composed of ten members including a Chairman and two Vice-Chairmen. Section 2(2) of The Highway Transport Board Act provides that the members of the Board shall be appointed by the Lieutenant Government in Council. Pursuant to The Interpretation Act, the appointment of members of the Board is for a period of time at the pleasure of the Lieutenant Governor.

The members of the Ontario Highway Transport Board exercise significant powers of a quasi-judicial nature, and to ensure the preservation of the independence of the Board in the performance of its statutory duties, your Committee is of the opinion that the members of the Board should not be subject to dismissal at the pleasure of the Lieutenant Governor.

We recommed that the Minister of Transportation and Communications consider an amendment to The Ontario Highway Transport Board Act to provide that the members of the Board appointed by the Lieutenant Governor in Council shall hold office during good behaviour, subject to removal from office only by the Lieutenant Governor and for cause in accordance with the defined principles and procedures analogous to those applicable to the removal of provincial court judges. We recommend that the Act be further amended to provide for the retirement of members of the Board upon attaining the age of sixty-five years and to provide for the resignation of a member of the Board by delivering, in writing, a signed notice of resignation, to the Minister of Transportation and Communications.

CONCLUSION

Your Committee believes that it is essential that this Committee's successor hold annual or biennial reviews of the operation of the Ontario Highway Transport Board and invite public participation in these reviews. Such reviews would ensure that members of the Assembly were fully informed of the Board's activities and able to evaluate the Board's performance. Furthermore, such reviews would assist the public in understanding the Board and its statutory duties.

The Board and the Minister of Transportation and Communications have a responsiblility to continuously monitor the operations of the Board and to maintain the integrity of its decisional and administrative processes. If significant doubt is cast on the integrity of the decisional process in a particular case, the Board should, on its own initiative or on the recommendation of the Minister of Transportation and Communications, order a rehearing of the matter (see Appendix 11 for an unreported decision of Robins, J. in Canadian Pacific Express Ltd., Smith Transport Co. Limited et al. v. The Ontario Highway Transport Board, United Parcel Service Canada Ltd. et al.).

Up until 30 June 1978, a situation existed at the Ontario Highway Transport Board in which procedures, methods and attitudes dating from the 1950's were represented in one man. Mr. Shoniker was a dedicated public servant concerned with the transport business in the Province of Ontario. With the appointment of Mr. Alexander and several new members of the Board, the Committee is confident that a new attitude respecting administrative and regulatory matters will prevail.

The administration of the Ontario Highway Transport Board must be flexible, equitable and impartial and be seen to be such. If not, the regulatory system in Ontario will be undermined.

APPENDIX 1

WITNESS	COUNSEL
E.J. Shoniker, Esq. Former Chairman Ontario Highway Transport Board	Bernard Chernos, Q.C.
Blenus Wright, Q.C. Assistant Deputy Attorney General Crown Law Office Civil	
John A. Wardrop, Esq. Member Ontario Highway Transport Board	Bruce C. McDonald, Esq.
Richard J. Zimmerman, Q.C. Barrister and Solicitor	J. Edgar Sexton, Q.C.
Vernon H. Page, Esq. Member Ontario Highway Transport Board	Royden M. Brigham, Esq.
Glen Smith, Esq. President United Parcel Service Canada Ltd.	Douglas C. McTavish, Esq.
Donald D. Diplock, Q.C. Vice-Chairman Ontario Municipal Board Former Vice-Chairman Ontario Highway Transport Board	
George C. Marrs, Esq. Vice-Chairman Ontario Highway Transport Board	

Ralph S. McCreath, Q.C.
Barrister and Solicitor

Thomas E. Quinn, Esq.
President
Quinn Truck Lines Limited

M.P. Forestell, Q.C.

John D. Hylton, Esq.
Special Counsel
Ontario Highway Transport Board

Ronald Secord, Esq.

J.N. Mulholland, Q.C.

Stephen P. Flott, Esq.
Executive Vice-President and
General Manager
Ontario Trucking Association Inc.

N.G. Leluk, Esq., M.P.P.

The Honourable James W. Snow, Esq., M.P.P.
Minister of Transportation and Communications

Owen J. Oliver, Esq.

Richard L. Nunn, Esq.

Thomas J. Sommerville, Esq.
Barrister and Solicitor

APPENDIX II

IN THE SUPREME COURT OF ONTARIO

Released 3/10/79

182-183/79

214-216/79

DIVISIONAL COURT

REID, ROBINS and MONTGOMERY, JJ.

IN THE MATTER OF The Judicial Review Procedure Act, S.O. 1971, Vol. 2, c. 48, as amended;

AND IN THE MATTER OF The Ontario Highway Transport Board Act, R.S.O. 1970, c. 316, as amended.

B E T W E E N :

CANADIAN PACIFIC EXPRESS LTD., SMITH TRANSPORT CO. LIMITED, THE ATTORNEY GENERAL OF CANADA, CANADIAN NATIONAL EXPRESS CO., WESTERN DISPATCH INC., and PUROLATOR COURIER LIMITED,

Applicants;

-and-

THE ONTARIO HIGHWAY TRANSPORT BOARD, UNITED PARCEL SERVICE CANADA LTD., and OTHERS,

Respondents.

- and -

IN THE MATTER OF The Ontario Highway Transport Board Act, R.S.O. 1970, Chapter 316;

AND IN THE MATTER OF The Motor Vehicle Transport Act, R.S.C. 1970, Chapter M-14;

AND IN THE MATTER OF The Public Commercial Vehicles Act, R.S.O. 1970, Chapter 375;

AND IN THE MATTER OF an application to consider a case stated by the Ontario Highway Transport Board pursuant to s. 20 of The Ontario Highway Transport Board Act.

J. Polika, Q.C. for The Ontario Highway Transport Board.

D.C. McTavish, for United Parcel Service Canada Limited.

Maureen J. Sabia, for Canadian Pacific Express Ltd and Smith Transport Co. Limited.

Paul J. Evraire, for The Attorney General of Canada.

M.W. Wright, Q.C. for Letter Carriers Union of Canada, Canadian Brotherhood of Railway Clerks and Canadian Brotherhood of Railway Transport & General Workers.

R. Storrey, for Greyhound Lines of Canada Ltd, Eastern Canadian Greyhound Lines Ltd, Voyageur Colonial Ltd, Ontario Motor Coach Association and Ontario Northland Transport Commission.

B E T W E E N :

UNITED PARCEL SERVICE CANADA LTD.,

Applicant;

-and-

ATTORNEY-GENERAL OF CANADA, CANADIAN PACIFIC EXPRESS, SMITH TRANSPORT CO. LIMITED, LETTER CARRIERS UNION OF CANADA, CANADIAN BROTHERHOOD OF RAILWAY CLERKS, CANADIAN BROTHERHOOD OF RAILWAY TRANSPORT & GENERAL WORKERS, GREYHOUND LINES OF CANADA LTD, EASTERN CANADIAN GREYHOUND LINES LTD, VOYAGEUR COLONIAL LTD, ONTARIO MOTOR COACH ASSOCIATION, ONTARIO NORTHLAND TRANSPORT COMMISSION and OTHERS,

Respondents.

Heard: April 2nd and 3rd, 1979.

ROBINS, J:

The principal point in issue in these proceedings is whether The Ontario Highway Transport Board acting on its own motion has jurisdiction under s. 17 of The Ontario Highway Transport Board Act to order the rehearing of an application previously decided by it.

On September 7th, 1977, The Ontario Highway Transport Board ("the Board") began hearing two applications

filed by United Parcel Service Canada Limited ("UPS"), a wholly owned subsidiary of United Parcel Service of America, Inc., for certificates of public necessity and convenience for an extra-provincial operating licence and a Class "D" public commercial vehicle operating licence. The applications were opposed by 152 parties and the hearing was very lengthy. It lasted some 110 days; approximately 715 witnesses were called and 1109 exhibits filed; the transcript runs to about 25,000 pages. The panel of the Board that heard the applications was composed of the then chairman of the Board and one member. The hearing concluded on May 23rd, 1978, and the Board rendered its decision on June 30th, 1978, denying both applications.

UPS moved against the decision on two fronts. Under s. 22 of The Ontario Highway Transport Board Act, R.S.O. 1970, c. 316, as amended ("the Act"), it applied for leave to appeal the decision to the Divisional Court; and, under s. 21 of the Act, it petitioned the Lieutenant-Governor in Council on August 15th, 1978, to vary the decision by reversing it and instructing the Board to issue the certificates of public necessity and convenience or, alternatively, to refer the decision back to the Board for reconsideration. On September 25th, 1978, UPS discontinued the application for leave to appeal.

On August 29th, 1978, UPS filed a supple-

mentary petition with the Lieutenant-Governor in Council. The gravamen of the submission made in that document is important to an appreciation of the atmosphere which came to surround the Board's decision of June 30th, 1978, and the reasons which impelled the Board on its own initiative to order the rehearing that is the subject of the proceedings now before this Court. UPS alleged serious improprieties with respect to the Board's decision rejecting its applications. More specifically, but briefly, it alleged that the "Reasons for Decision" were not written by the then chairman or his associate but by a lawyer who appeared at the hearing before the Board as counsel representing major objectors to the UPS applications. This Court, it should be made clear, is not called upon to determine the validity or otherwise of the UPS allegations; that issue is not before us. But, it is common ground, and was referred to in argument, that the allegations in respect to the writing of the Board's decision received wide publicity in the media and became the subject of public comment and discussion.

As matters proceeded, the Minister of Transportation and Communications wrote the new chairman of the Board that he and the Attorney General had discussed "the shadow which has been cast over the decision of the Board in the matter of the application of United Parcel Service Canada Limited as a result of the allegations recently made by the

applicant" and said that in their opinion "the circumstances surrounding the preparation of the decision are such to make it inappropriate for Cabinet to take any action on this decision". He recommended that "the Board proceed to rehear the application pursuant to section 17 of The Ontario Highway Transport Board Act". The Board in response advised the Minister that, after careful consideration, it had decided to initiate a rehearing. The Minister, it might be noted, bears ultimate authority under the relevant legislation for granting the licences sought by UPS subject to the prohibition that licences are not to be issued in the absence of a certificate of public necessity and convenience from the Board.

On November 18th, 1978, a notice was published in the Ontario Gazette that the UPS applications would be reheard pursuant to s. 17 on January 15th, 1979. A new panel of the Board was struck for the rehearing. Before the scheduled date, an agreement was reached by counsel for the parties (without conceding, at least in so far as the parties before this Court are concerned, that the Board had the jurisdiction to rehear), that the transcript of evidence and exhibits of the first hearing might be filed on the rehearing. Counsel for UPS undertook to limit himself to 50 additional witnesses; the respondents did not undertake the number they might call.

The rehearing has not been proceeded with. On January 16th, 1979, Canadian Pacific Express and Smith Transport Co. Limited (who I shall refer to jointly as "CP"), supported by others, requested the Board to state a case for the opinion of the Divisional Court with respect to whether the proposed rehearing would be in excess of the Board's jurisdiction or in contravention of any principles of natural justice. The Board refused that application but pursuant to s. 20(1) of the Act, stated a case itself in which it submitted the following question for the consideration of this Court:

> "Does the Ontario Highway Transport Board have jurisdiction to rehear the applications herein pursuant to the provisions of section 17 of the Ontario Highway Transport Board Act."

CP, not being satisfied with the case as stated by the Board, made application pursuant to s. 20(2) for an order directing the Board to state the case it proposed but subsequently withdrew that application in favour of applications launched by it, The Attorney General of Canada and others for judicial review of the Board's decision to rehear the UPS application.

There are thus two applications before the Court: (1) the application of the Board by way of stated case posing the question set forth above, and (2) the application of CP, The Attorney General of Canada and others to quash or set

aside by way of judicial review the Board's decision to rehear the UPS applications. These applications raise basically the same issues, were argued at the same time, and will be dealt with together in these reasons. The Board and UPS stand on one side of the dispute and CP, The Attorney General and the others who appeared in support of their position, stand on the other. For convenience I shall refer to those who object to the Board's jurisdiction to rehear as "the respondents".

The facts contained in the stated case and those relied upon in the judicial review application are essentially the same and are included in the facts I have outlined. I should add, though it is no doubt evident, that the Board did not hold a hearing on the question of whether the UPS applications should be reheard, no Order in Council was issued under s. 21 directing the rehearing, and UPS made no application to the Board for the rehearing.

Was the Board then in the circumstances of this matter, on its own motion, entitled to order a rehearing of the UPS applications pursuant to s. 17 of the Act?

Section 17 provides that:

> "17. The Board may at any time and from time to time rehear any application and may review, amend or revoke its decisions, orders, directions, certificates or approvals and may within its jurisdiction review, amend or revoke any decision,

> certificate or approval made before the 17th day of October, 1955, by the Ontario Municipal Board under The Public Commercial Vehicles Act and The Public Vehicles Act."

That section, in the submission of the respondents, does not empower the Board to rehear an application on its own motion; before it is entitled to do so, a party to the proceedings must have applied for the rehearing or the Lieutenant-Governor in Council must have directed it under s. 21 of the Act. The Board and UPS take the contrary position contending that s. 17 confers a discretionary power on the Board exercisable on its own motion without any requirement that there be a prior application for rehearing or direction by Order in Council.

Counsel in the course of their submissions referred us to cases such as Labour Relations Board of the Province of British Columbia and British Columbia Interior Fruit and Vegetable Workers Union, Local 1572 v. Oliver Co-operative Growers Exchange, [1963] S.C.R. 7 (S.C.C.), Regina v. Ontario Lab. Rel. Bd. Ex parte Genaire Ltd., [1958] O.R. 637 (C.A.), and Re Merrens et al. and Municipality of Metropolitan Toronto, [1973] 2 O.R. 265 (Div.Ct), in which provisions similar to s. 17 in other statutes were the subject of judicial consideration. Reference was also made and argument directed to Re Parent Cartage Ltd. and Ontario Highway Transport Board, 20 O.R. (2d) 219, a decision of this Court, differently constituted,

which, since the hearing before us, has been reversed by a judgment of the Court of Appeal released on June 29th, 1979.

It is plain from the reasons of the Court of Appeal that the Board's authority under s. 17 is not as broad as the Board has interpreted it or as the Divisional Court held it to be. To determine the scope of the Board's power under that section, or more specifically to determine whether the rehearing ordered in the instant case is precluded by the decision in Parent, it is important to examine the Court of Appeal's reasons in that case. The application for prohibition against the Board there arose out of a decision to review the terms of a certificate of public necessity and convenience pursuant to which a licence had been issued. The review, which was prompted by a complaint from competing carriers that the licensee was not charging rates as filed with the Board, placed the licensee in jeopardy in that the terms of its certificate might be amended or revoked. After a detailed analysis of the statutory authority relating to the granting, amending and cancelling of licences to conduct the business of transporting goods by means of public commercial vehicles, Dubin, J.A., who delivered the judgment of the Court, concluded:

> "In the instant case, the board is proposing to bypass the statutory procedure and deny the licensee its statutory safeguards by initiating proceedings to inquire into an alleged violation of the provisions of the Act. Not only is there no statutory authority in The Public Commercial Vehicles Act for such a

> procedure, but indeed there is no provision in the statute for the board to report to the minister in the event that the board were to conduct such a hearing. In my opinion where there is a complaint that a licensee has contravened the Act, the initiation of the proceedings lies with the minister, and the statutory provisions which could lead to a cancellation or suspension of the licence must be followed.
>
> ...even where the matter of public necessity and convenience is to be reviewed, s. 8, which I have reproduced above, governs the procedure to be followed. Again it is the minister who may refer an operating licence to the board so that the terms and conditions of the licence may be reviewed, having regard to the requirements of public necessity and convenience. It is only on such a reference that the board after a hearing may report thereon to the minister, and thereupon it is the minister who may confirm, amend or cancel the conditions of the licence, and the minister must give reasons for his decision to the licensee."

In respect to the submission that the Board was empowered to review the licence by reason of s. 17 of the Act, the Court distinguished the cases on which the Divisional Court had relied, namely, Labour Relations Board et al. v. Oliver Co-operative Growers Exchange, supra, and Regina v. Ontario Lab. Rel. Bd. Ex parte Genaire Ltd., supra, on the ground that the labour relations statutes in question in those cases did not contain provisions comparable to The Public Commercial Vehicles Act and Dubin, J.A. went on to hold that:

> "In the instant case, the board is proposing 'to achieve by a "short cut" a result which under the Act can only be achieved by taking certain specified steps', and there are provisions in

> the Act which specifically 'cover the situation'.
>
> In my opinion, where a statute authorizes action to be taken in a specified manner, the manner therein provided must be followed."

While Parent establishes that the Board's power to review under s. 17 is narrower or more restricted than was previously thought, the case, in my opinion, cannot be so interpreted as to foreclose the Board from directing, on its own motion, a rehearing or review in all conceivable circumstances or, put another way, cannot be so interpreted as to entirely prohibit the Board from initiating proceedings under s. 17. The Court in Parent was, of course, not called upon to consider the Board's power in a situation akin to the instant case but, in the course of his reasons, Dubin, J.A. recognized that circumstances may arise in which the Board can act on its own initiative or at least left the question open. He commented:

> "Assuming, however, that there is a right in the board to initiate a review of a prior decision under s. 17 under certain circumstances, such as where there has been a fraud practised upon the board, or where the board desires to correct some error in an earlier decision, such a review must relate to the correctness of the earlier decision, or for the purpose of giving true effect to what was intended. Section 17 cannot be resorted to where the subject matter of the complaint does not bear on the original decision and where The Public Commercial Vehicles Act sets forth the procedure to be followed for an inquiry into such a complaint."

In the present case, the Board proposes a rehearing by a new panel and intends the applications to be commenced afresh and decided without regard to the previous proceedings, apart, that is, from the filing of the transcript and exhibits which counsel have sensibly agreed to. The course proposed by the Board does not by-pass any statutory procedures of The Motor Vehicle Transport Act or The Public Commercial Vehicles Act; those statutes contain no provisions or directions dealing with situations of the kind the Board faced here. The rehearing involves neither fresh allegations as between the parties or new issues - the question remains one of public necessity and convenience. Nor are any of the parties, unlike Parent, placed in jeopardy by the rehearing; there are no licences which may be amended or revoked; and although the rehearing may reopen the possibility of further competition for the respondents, they hold no licence or possess any rights granting them immunity from increased competition.

The factual circumstances of the instant case are clearly distinguishable from those of Parent and form the type of situation suggested there in which the Board is empowered under s. 17 to order a rehearing. Admittedly, a new hearing will involve some inconvenience and expense for the parties but in the unfortunate and, hopefully, rare circumstances presented by this case, I am of the view that s. 17 is available to the Board and can be invoked to enable it to proceed as it proposes.

Fraud practiced upon the Board or error in an earlier decision are suggested in Parent as circumstances in which the Board on its own initiative may resort to s. 17. Other circumstances come to mind. For instance, if it were to appear or be reasonably suspected that a decision had been tainted by bribery or corruption of a member, surely the Board would not have to await outside direction or application for re-hearing but could itself embark on the rehearing. So also if a member was in, or was apprehended to be in a conflict of interest position by having an economic or other ascertainable interest at stake in the outcome of the proceedings. Such allegations relate directly, not only to the correctness of the original decision, but to its validity and propriety and, equally important, to public perception of and public confidence in the administrative process for which the Board is responsible.

Returning to the facts of this case, the allegation that a lawyer acting for parties opposed to the UPS applications privately participated in the writing of the former chairman's reasons is manifestly a serious one. Indeed, it is difficult to imagine a more serious incursion on fairness than to permit a representative of a contesting party to privately engage in any aspect of the decisional process: see Sawyer v. The Ontario Racing Commission (C.A. released May 28th, 1979) and Re Bernstein and College of Physicians and Surgeons of Ontario, 15 O.R. (2d) 447. Section 18(b) of the Act even legis-

lates the obvious in stating that members of the Board assigned to render a decision after a hearing "shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any person or any party or his representative except upon notice to and opportunity for all parties to participate...".

The respondents argue that the allegations have not been proven and, on the material before this Court, that is so. But there can be no question that the allegations throw serious doubt on the Board's decision, and, in my opinion, it may remove that doubt and clear the air by initiating a rehearing under s. 17. Whether the allegations are established is not the real issue. What is at stake is the integrity of the Board's process and, in my view, it is for the Board to determine in its judgment whether the charges warrant ordering the matter reheard. The allegations here, to be realistic, involve the internal workings of the Board itself, what went on behind the scenes, and the Board surely is in the best position to decide whether the particular circumstances dictate a rehearing. That decision is within the Board's discretionary power and is not open to question by the Court so long as the Board has not acted capriciously or otherwise than in good faith, and there is no suggestion here that it has.

In sum, it is my view that an administrative tribunal holding the statutory authority of s. 17 is vested with

a discretionary power to initiate proceedings to rehear an application when the integrity of its original decisional process is placed in issue. I do not interpret s. 17, or the precedents to which we have been referred, to require a tribunal, in situations not in any way covered by its statutes, to await initiation by others of proceedings it deems necessary to preserve and protect the integrity of the administrative process entrusted to it by the legislature. In such circumstances, the tribunal, in my opinion, is entitled to act on its own and need not remain sedentary.

The respondents make the further argument that even if the Board has the power to rehear on its own motion, it should have given the parties "an opportunity to be heard on the question of whether or not it should rehear" and by failing to do so acted in contravention of the principles of natural justice. In support of this submission reliance is placed on the well-known line of cases concerned with the duty and standards of administrative fairness of which Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police (1979), 88 D.L.R. (3d) 671 (S.C.C.) and Inuit Tapirisat of Canada v. The Right Honourable Jules Léger, [1979] 1 F.C. 213, are recent examples.

With deference, I cannot conclude that the Board acted unfairly towards the respondents in deciding as it did to hear the applications a second time. The requirements of administrative fairness must always be determined in the context of the particular case. In this one, and I need hardly say that my views are restricted to its particular facts, the procedure adopted comports with the fairness required. The decision to rehear appears eminently fair and reasonable and obviously dictated by the circumstances. No consequences flow from that decision adversely affecting legal rights and no lis between parties is determined by it.

Indeed, it is the respondents' position, as I understand their argument, that a hearing by the Board on the rehearing question would serve no useful purpose in this particular situation. They contend that the Board erred, in any event, "in taking into account an alleged 'shadow' cast on the writing of the reasons", and that an inquiry into the facts was required but such an inquiry, the argument runs, is beyond the statutory power of the Board and could be conducted only by the courts. In short, the respondents' contention is that the ground which furnished the foundation for the Board's decision to rehear was one requiring judicial adjudication before it could be acted upon by the Board.

For reasons already indicated, I think that position untenable. The Board has a duty to maintain the

integrity of its administrative responsibility. When allegations are raised calling into question the integrity of the decisional process, whether they are proved in a court of law or not, the Board, if it concludes they cast a significant doubt on the integrity of its proceedings, may take steps to remove the doubt by exercising the jurisdiction conferred on it by s. 17 of the Act. It need not await a court order in a matter of this nature. Whether it should initiate proceedings under s. 17 in particular circumstances or not, is a decision for the Board. That decision is within its discretionary power and, absent bad faith, capriciousness or unfairness, is not subject to judicial review.

For these reasons I would answer the stated case by holding that the Board has jurisdiction to rehear the UPS applications and would dismiss the applications for judicial review. UPS is entitled to the costs of these proceedings as against the applicants for judicial review.

Released: October 3rd, 1979.

APPENDIX III

CODE OF ETHICS FOR PRACTITIONERS BEFORE THE INTERSTATE COMMERCE COMMISSION

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PREAMBLE

No rules of conduct can be framed which will particularize all the duties of the practitioner in the varying phases of litigation or in his relations to clients, adversaries, other practitioners, the Commission and the public. The following canons of ethics are adopted as a general guide for those admitted to practice before the Interstate Commerce Commission.

It will be remembered that the practitioners before the Commission include (a) lawyers, who have been regularly admitted to practice law and (b) others having traffic or other technical experience qualifying them to aid the Commission in administration of the Interstate Commerce Act and related acts of Congress. The former are bound by a broad code of ethics and unwritten rules of professional conduct which apply to every activity of a lawyer; for the latter, no code of ethics has been written heretofore. The following canons do not release the lawyer from any of the duties or principles of professional conduct by which lawyers are bound. They apply alike to all practitioners before the Commission and the setting forth therein of particular duties or principles of conduct should not be construed as a denial of the existence of others equally imperative although not specifically mentioned. The word "Commission" as used herein includes Divisions of the Commission, and the representatives of the Commission, whether members, examiners, or other employees connected with the matter in hand.

CANONS OF ETHICS

1. *Standards of ethical conduct in courts of the United States to be observed.* These canons are in furtherance of the purpose of the Commisison's rules of practice which enjoin upon all persons appearing in proceedings before it to conform, as nearly as may be, to the standards of ethical conduct required of practitioners before the courts of the United States; and such standards are taken as the basis for these specifications, modified insofar as the nature of the practice before the Commission requires.

2. *The duty of the practitioner to and his attitude toward the Commission.* It is the duty of the practitioner to maintain toward the Commission a respectful attitude, not for the sake of the temporary incumbent of the office, but for the maintenance of the importance of the functions he administers. In many respects the Commission functions as a Court, and practitioners should regard themselves as officers of that Court and strive to uphold its honor and dignity. The Commission, not being wholly free to defend itself, is peculiarly entitled to receive the support of the practitioner against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a member or employee of the Commission it is the right and duty of the practitioner to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

3. *Punctuality and expedition.* It is the duty of the practioner not only to his client, but to the Commission and to the public, to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

4. *Attempts to exert political influence on the Commission.* It is unethical for a practitioner to attempt to sway the judgement of the Commission by propaganda, or by enlisting the influence or intercession of members of the Congress or other public officers, or by threats of political or personal reprisal.

5. *Attempts to exert personal influence on the Commission.* Marked attention and unusual hospitality on the part of a practitioner to a Commissioner, examiner, or other representative of the Commission, uncalled for and unwarranted by the personal relations of the parties, subject both to misconstruction of motive and should be avoided. A self-respecting independence in the discharge of duty, without denial or diminution of the courtesy and respect due the official station is the only proper foundation for cordial personal and official relations between Commission and practitioners.

6. *The selection of Commissioners.* The nomination of commissioners is a duty of the President, and confirmation, of the Senate. It is the duty of the practitioners insofar as they attempt to advise the appointing or confirming officers, to endeavor to prevent any consideration from outweighing fitness in the selection.

7. *The practitioner's duty in its last analysis.* No client, corporate or individual, however powerful, no cause, civil or political however important, is entitled to receive, and no practitioner should render, any service or advice involving disloyalty to the law or disrespect of its official ministers, or corruption of any person or persons exercising a public office or employment or private trust, or deception or betrayal of the public. In rendering any such improper service or advice the practitioner invites and merits stern and just condemnation. Correspondingly, he advances the honor of his calling and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, although until a statute shall have been construed and interpreted by competent adjudication, he is free and entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all he will find his highest honor

in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

8. *Private communications with the Commission.* In the disposition of contested proceedings brought under the Interstate Commerce Act the Commission exercises quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity. It is required to administer the Act and to consider at all times the public interest beyond the mere interest of the particular litigants before it. To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a Commissioner, examiner, or other representative of the Commission about a pending cause, or to argue privately the mertits thereof in the absence of their adversaries or without notice to them. Practitioners at all times should scrupulously refrain in their communications to and discussions with the Commission and its staff from going beyond ex parte representations that are clearly proper in view of the administrative work of the Commission.

9. *Adverse influences and conflicting interests.* It is the duty of a practitioner at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of the person to represent or assist him.

It is unethical to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon a practitioner represents conflicting interests when in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

10. *Joint association of practitioners and conflicts of opinion.* A client's proffer of the assistance of additional practitioner should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A practitioner should decline association as colleague if it is objectionable to the practitioner first retained, but if the client should relieve the practitioner first retained, another may come into the case.

When practitioners jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted by them unless the nature of the difference makes it impracticable for the practitioner whose judgement has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another practitioner are unworthy of those who should be brethren, but nevertheless, it is the right of any practitioner, without fear or favor, to give proper advice to those seeking relief against an unfaithful or neglectful practitioner, generally after communication with the practitioner of whom the complaint is made.

11. *Withdrawal from employment.* The right of a practitioner to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The practitioner representing him should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the practitioner's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the practitioner may be warranted in withdrawing on due notice to the client, allowing him time to employ another. So also when a practitioner discovers that his client has no case and the client is determined to continue it; or even if he finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, he should refund such part of the retainer as has not been clearly earned.

12. *Advising upon the merits of a client's cause.* A practitioner should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. He should beware of bold and confident assurances to clients, especially where employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

13. *Negotiations with opposing party.* A practitioner should not in any way communicate upon the subject of controversy with a party represented by another practitioner except upon express agreement with the practitioner representing such party; much less should he undertake to negotiate or compromise the matter with him, but should deal only with the practitioner who

represents the other party. It is incumbent upon the practitioner most particularly to avoid everything that may tend to mislead a party not represented by a practitioner, and he should not undertake to advise him as to the law.

14. *Fixing the amount of the fee.* In fixing fees, practitioner should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, although his poverty may require a less charge, or even none at all.

15. *Compensation, commission, and rebates.* A practitioner should accept no compensation, commissions, rebates or other advantages from the parties to the proceeding other than his client without the knowledge and consent of his client after full disclosure.

16. *Contingent fees.* Contingent fees should be such only as are sanctioned by law. In no case, except a charity case, should they be entirely contingent upon success.

17. *Division of fees.* No division of fees for services is proper, except with a member of the bar or with another practitioner, based upon a division of service or responsibility. It is unethical for a practitioner to retain laymen to solicit his employment in pending or prospective cases, and reward them by a division of fees, and such a practice cannot be too severely condemned.

18. *Suing clients for fees.* Controversies with clients concerning compensation are to be avoided insofar as compatible with self-respect and with the right to receive reasonable recompense for services; and lawsuits against clients should be resorted to only to prevent injustice, imposition or fraud.

19. *Acquiring interest in litigation.* The practitioner shall not purchase or otherwise acquire any pecuniary interest in the subject matter of the litigation which he is conducting.

20. *Expenses.* A practitioner may not properly agree with a client that the practitioner shall pay or bear the expenses of litigation. He may in good faith advance expenses as a matter of convenience but subject to reimbursement by the client.

21. *Witnesses.* A practitioner shall not undertake that the compensation of a witness shall be contingent upon the success of the cause in which he is called. If the ascertainment of truth requires that a practitioner should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client.

22. *Dealing with trust property.* Money of the client or other trust property coming into the possession of the practitioner should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with the practitioner's private property or be used by him.

23. *How far a practitioner may go in supporting a client's cause.* Nothing will operate more certainly to create or foster popular prejudice against practitioners as a class, and deprive them of that full measure of public esteem and confidence which belongs to the proper discharge of their duties than does the false claim, often set up by the unscrupulous in defense of questionable transaction, that it is the duty of the practitioner to do whatever may enable him to succeed in winning his client's cause.

The practitioner owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by rules of law, legally applied. No fear of the disfavor of the Commission or public unpopularity should refrain him from full discharge of his duty. The client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his counsel to assert every such remedy or defense. But it is to be steadfastly borne in mind that this great trust is to be performed within and not without the bounds of the law. Admission to the privilege of appearing before the Commission as representing another does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client.

24. *Restraining clients from improprieties.* A practitioner should use his best efforts to restrain and to prevent his clients from doing those things which he himself ought not to do, particularly with reference to their conduct towards the Commission, other practitioners, witnesses and suitors. If a client persists in such wrong-doing, the practitioners should terminate their relations.

25. *Ill-feeling and personalities between advocates.* Clients, not their representatives, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence practitioners in their conduct and demeanor toward each other or toward suitors in the case. All personalities between practitioners should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idio-

syncracies of practitioners on the other side. Personal colloquies between practitioners which cause delay and promote unseemly wrangling should also be carefully avoided. Their statements should be addressed to the Commission.

26. *Treatment of witnesses and litigants.* A practitioner should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudice of a client in the trial or conduct of a cause. The client cannot be made the keeper of the practitioner's conscience in such matters. He has no right to demand that the practitioner representing him shall abuse the opposing party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking on his own behalf.

27. (None.)

28. *Discussion of pending litigation in public press.* Attempts to influence the action and attitude of the members and examiners of the Commission through propaganda or through colored or distorted articles, in the public press, are more apt to react against than in favor of the parties resorting to such measures. On the other hand, it is not against the public interest or unfair to the Commission that the facts of pending litigation shall be made known to the public through the press in a fair and unbiased manner and in dispassionate terms. Practitioners should themselves avoid, and should counsel their clients against, giving to the public press any press notices or statements of a nature intended to inflame the public mind, to stir up possible hostility toward the Commission, or to influence the Commission's course and judgement as to pending or anticipated litigation. When the circumstances of a particular case appear to justify a statement to the public through the press, it is unethical to make it anonymously.

29. *Candor and fairness.* The conduct of practitioners before the Commission and with other practitioners should be characterized by candor and fairness. The nontechnical character and liberality of the Commission's practice call for scrupulous observance of the principles of fair dealing and just consideration for the rights of others.

It is not candid or fair for a practitioner knowingly to misstate or misquote the contents of a paper, the testimony of a witness, the language or the argument of an opposing practitioner, or the language or effect of a decision or a text book; or, with knowledge of its invalidity to cite as authority a decision which has been overruled or otherwise impaired as a precedent or a statute which has been repealed; or in argument to assert as a fact that which has not been proved, or to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A practitioner should not offer evidence, which he knows the Commission should reject, in order to get the same before the Commission by argument for its admissibility, or arguments upon any point not properly calling for determination. He should not introduce into an argument remarks or statements intended to influence the bystanders.

These and all kindred practices are unethical and unworthy of a practitioner.

30. *Right of practitioner to control the incidents of the trial.* As to incidental matters pending the trial, not affecting the merits of the cause or working substantial prejudice to the rights of the client, such as forcing the opposing practitioner to trial when he is under affliction or bereavement, forcing the trial on a particular day to the injury of the opposing practitioner when no harm will result from trial at a different time, agreeing to extensions of time and the like, the practitioner and not the client, must be allowed to judge. In such matters no client has a right to demand that his practitioner shall be illiberal or do anything therein repugnant to the practitioner's sense of honor and propriety.

31. *Taking technical advantage of opposing practitioner; agreements with him.* A practitioner should not ignore known customs or practice of the Commission, even when the law permits, without giving timely notice to the opposing practitioner. Insofar as possible, important agreements affecting the rights of the clients should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing.

32. *Advertising, direct or indirect.* The most worthy and effective advertisment possible is the establishment of a well-merited reputation for capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not improper. But solicitation of employment by circulars or advertisments, or by personal communications or interviews, not warranted by personal relations, is unethical. It is equally unethical to procure business by indirection through touters of any kind. Indirect advertisement for em-

ployment by furnishing or inspiring newspaper comments concerning causes in which the practitioner has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the practitioner's position, and all other like self-laudation, lower the tone of the calling and are intolerable.

33. *Professional card.* The simple professional card mentioned in Canon 32 may with propriety contain only a statement of the practitioner's name (and those of his associates), occupation, address, telephone number, and special branch or branches of practice. Such cards may be inserted in reputable lists and may give authorized references, or name clients with their permission.

34. *Stirring up litigation, directly or through agents.* It is unethical for a practitioner to volunteer advice that a proceeding be brought before the Commission, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unethical but it is indictable at common law. It is disreputable for a practitioner to hunt up defects or other causes of action and disclose them in order to be employed to bring complaint, or to breed litigation by seeking out those having claims for damages or any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly, or indirectly, those who bring or influence the bringing of such cases to his office to seek his services. No complaint should be brought before the Commission by a practitioner except with the distinct knowledge and specific consent of the client in the particular case. A duty to the public and to the Association devolves upon every member having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disciplined or disbarred.

35. *Justifiable and unjustifiable litigation.* The practitioner must decline to conduct a cause or to make a defense when convinced that it is intended merely to harass or to injure the opposing party, or to work oppression or wrong. But otherwise, it is his right, and having accepted retainer, it becomes his duty, to insist upon the judgment of the Commission as to the merits of his client's claim. His appearance should be deemed equivalent to an assertion upon his honor that in his opinion his client's case is one proper for determination.

36. *Responsibility for litigation.* No practitioner is obliged to act either as adviser or advocate for every person who may seek to become his client. He has the right to decline employment. Every practitioner upon his own responsibility must decide what employment he will accept, what causes he will bring before the Commission for complainants, or contest for defendants or respondents. The responsibility for advising as to questionable transactions for bringing questionable proceedings, for urging questionable defenses is his alone. He cannot escape it by urging as excuses that he is only following his client's instructions, or that he is under a stated retainer or in the regular employment of his client.

37. *Discovery of imposition and deception.* When a practitioner discovers that some fraud or deception has been practiced, which has unjustly imposed upon the Commission or a party, he should endeavor to rectify it; first by advising his client to forego any advantage thus unjustly gained and, if his client refuses, by promptly informing the injured person or his counsel (practitioner) so that appropriate steps may be taken.

38. *Upholding the honor of the calling.* Practitioners should expose without fear or favor before the proper tribunals corrupt or dishonest conduct and should accept without hesitation employment against a practitioner who has wronged his client. The practitioner upon the trial of a cause in which perjury has been committed owes it to the Commission and to the public to bring the matter to the knowledge of the prosecuting authorities. The practitioner should aid in guarding the bar of the Commission against admission thereto of candidates unfit or unqualified because deficient in either moral character or education. A practitioner should propose no person for admission to practice before the Commission unless from personal knowledge or upon reasonable inquiry he sincerely believes and is able to vouch that such person possesses the qualifications prescribed in the Commission's rules of practice. He should strive at all times to uphold the honor and maintain the dignity of his calling and to improve not only the law but the administration of justice.

39. *Intermediaries.* The services of a practitioner should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and practitioner. His responsibility and qualifications are individual. He should avoid all relations which direct the performance of his duties in the interest of such intermediaries. His relation to the client should be personal, and the responsibility should be direct to the client.

He may accept employment from any organization such as an association, club or trade organization, authorized by law to be a party to proceedings before the Commission, to render services in such proceedings

in any matter in which the organization, as an entity, is interested. This employment should only include the rendering of such services to the members of the organization in respect to the individual affairs as are consistent with the free and untrammeled performance of his duties to the Commission.

Nothing in this Canon shall be construed as conflicting with Canon 17.

40. *Retirement from public employment.* A practitioner, having once held public office or having been in the public employ, should not after his retirement, accept employment as an advocate or adviser in the same proceeding or as to the same, or substantially the same, facts as were involved in any specific question which he investigated or passed upon in a judicial or quasi-judicial capacity while in such office or employ, whether the same or different parties are concerned.

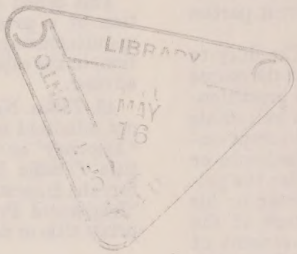
41. *Confidences of a client.* The duty to preserve his client's confidences in the course of his employments outlasts the practitioner's employment, and extends as well to his employees. None of them should accept employment which involves the disclosure or use of these confidences, either for the private advantage of the practitioner or his employees or to the disadvantage of the client, without knowledge and consent of the client even though there are other available source of such information. A practitioner should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a practitioner is falsely accused by his client, he is not precluded from disclosing the truth in respect to the false accusation. The announced intention of a client to commit a crime is not included within the confidences which a practitioner is bound to respect. He may properly make such disclosures as to prevent the act or protect those against whom it is threatened.

42. *Partnership-names.* Partnerships among practitioners for the practice of their calling are very common and are not to be condemned. The rules of the Commission provide that corporations of firms will not be recognized. Practitioners before the Commission should therefore appear individually and not as members of partnerships. In the formation of partnerships care should be taken not to violate any law locally applicable; care should also be taken to avoid any misleading name or representation which would create a false impression as to the position or privileges of a member not locally admitted, or who is not duly authorized to practice, and as such amenable to discipline. No person should be held out as a practitioner or member who is not so admitted. No practitioner who is not admitted to practices in the courts should be held out in a way which will give the impression that he is so admitted. No false or assumed or trade name should be used to disguise the practitioner or his partnership. The continued use of the name of a deceased or former partner is or may be permissible by local custom, but care should be taken that no imposition or deception is practiced through this use. If a member of the firm becomes a Commissioner, or an Examiner or other employee of the Commission his name should not be retained in the firm name, as such retention may give color to the impression that an improper relation or influence is continued or possessed by the firm.

This canon does not inhibit the association of a practitioner with a mercantile, manufacturing, or other commercial institution, in the capacity of its representative or adviser.

43. *Titles.* No member of the Association not admitted to the bar shall use the title "Attorney" or "Counsel" but should use the title "Traffic Manager", "Practitioner before the Interstate Commerce Commission", "Registered Practitioner", or other appropriate title or designation.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